1978

Carl Winsness and Associates, A Partnership v. M.J. Conoco Distribuors, Inc., A Utah Corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL WINSNESS AND ASSOCIATES, A Partnership, Plaintiff-Appellant, vs. M. J. CONOCO DISTRIBUTORS, INC., A Utah Corporation, Defendant-Respondent.	)	Case No. 15501

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Tooele County
Honorable Peter F. Leary, Judge

THOMAS DUFFIN, ESQ.
Suite 510
Ten Broadway Building
Salt Lake City, Utah 84101

CRAIG STEPHENS COOK, ESQ.
3645 East 3100 South
Salt Lake City, Utah 84109

Attorneys for Plaintiff-Appellant

ALLEN H. TIBBALS, ESQ.
400 Chancellor Building
220 South 200 East
Salt Lake City, Utah 84111

Attorney for Defendant-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL WINSNESS AND ASSOCIATES, A Partnership, Plaintiff-Appellant, vs. M. J. CONOCO DISTRIBUTORS, INC., A Utah Corporation, Defendant-Respondent.	)	Case No. 15501

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Tooele County
Honorable Peter F. Leary, Judge

THOMAS DUFFIN, ESQ.
Suite 510
Ten Broadway Building
Salt Lake City, Utah 84101

CRAIG STEPHENS COOK, ESQ.
3645 East 3100 South
Salt Lake City, Utah 84109

Attorneys for Plaintiff-Appellant

ALLEN H. TIBBALS, ESQ.
400 Chancellor Building
220 South 200 East
Salt Lake City, Utah 84111

Attorney for Defendant-Respondent

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL WINSNESS AND ASSOCIATES, A Partnership, Plaintiff-Appellant, vs. M. J. CONOCO DISTRIBUTORS, INC., A Utah Corporation, Defendant-Respondent.	Case No. 15501

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action brought by plaintiff against defendant corporation relating to a lease of a service station in Delle, Utah. Plaintiff-lessor alleged that defendant-lessee breached the leasing agreement by failing to keep the service station open for 24 hours a day, by incorrectly reporting the number of gallons pumped in the station during certain months, by failing to construct a sewage lagoon, by failing to keep the premises in good repair, and for punitive damages.

DISPOSITION IN LOWER COURT

A jury trial commenced in Tooele County on June 14, 1977 before the Honorable Peter F. Leary of the Third Judicial District. After four days of testimony plaintiff concluded his case. Defendant then moved for a directed verdict as to all five counts. The court directed a verdict as to the second, third, fourth, and fifth causes of action and reserved the first

cause of action for later determination. (Transcript, hereinafter Tr., pp. A-45 to A-47).

Subsequently, the trial court directed a verdict as to the first cause of action and dismissed the jury. (Tr., pp. 533-535).

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks a new trial as to its first and third causes of action.

STATEMENT OF FACTS

On November 24, 1971 a lease was entered into between Carl Winsness and Associates, plaintiff-appellant, and M. J. Conoco Distributors, Inc., defendant-respondent. (Exhibit, hereinafter Ex. 5). The lease concerned a service station in Delle, Utah which is 72 miles east of Wendover and 51 miles west of Salt Lake. (Tr., p. 34).

In 1972 a dispute arose between the plaintiff and defendant as to the interpretation of this leasing agreement. An action was filed in the Third Judicial District Court of Tooele County, Civil No. 7761, by plaintiffs asking for certain remedies against defendant. Plaintiff charged that the defendant had failed to maintain 24-hour-a-day service, had failed to pay rent as provided in the contract, and had failed to build a sewage lagoon as agreed upon in the leasing contract.

After extensive negotiation a stipulation was entered into between the parties supposedly resolving these issues. (Ex. P-6). The stipulation was signed on April 5, 1974 and a judgment was entered in accordance with the stipulation by the Honorable Gordon Hall on April 22, 1974. (Ex. P-7).

Approximately 1-1/2 years after the stipulation and judgment had been entered in the previous action plaintiff was forced to file the present action. Basically the same complaints were repeated in plaintiff's initial four causes of action. The first cause alleged that defendant had breached its rental agreement by failing to maintain the station on a 24-hour basis and that because plaintiff was to be paid rent based upon the number of gallons sold at the station that plaintiff had suffered a financial loss of not less than $20,000.

The second cause of action demanded an accounting of the number of gallons sold during the period based upon information and belief that incorrect amounts were being reported to the plaintiff. The third cause of action alleged damages for failure to complete a sewage lagoon system as provided in the stipulated judgment of 1974 and sought damages of $250 a month for the reasonable rental of a restaurant which could not be constructed until the lagoon was complete. Finally, the fourth cause of action alleged that the service station was not kept in good repair and that plaintiff was entitled to damages. (Record, hereinafter R., pp. 20-1).

An amended complaint was filed by plaintiff on March 22, 1976 adjusting the amount of damages as to the first four counts and adding a fifth cause of action for punitive damages alleging that defendant intentionally and willfully violated the terms of the lease. (R., pp. 79-76).

On March 30, 1976 defendant filed an answer to the amended complaint and a counterclaim. The counterclaim alleged that

plaintiff interrupted defendant's right of quiet enjoyment of the premises and also alleged that plaintiff interfered with defendant's efforts to construct the lagoon. Finally, defendant sought punitive damages against plaintiff for the alleged intentional interference and obstruction against defendant. (R., pp. 81-80).

On February 2, 1977 a preliminary pre-trial order was made by Judge Peter F. Leary at which time plaintiff's second cause of action for an accounting was dismissed subject to amendment. The pre-trial order also disposed of several motions made by both parties and requested memoranda as to certain legal issues. (R., pp. 245-243).

On February 10, 1977 a third amended complaint was filed by plaintiff extensively revising and clarifying the initial claims of plaintiff made in the previous two complaints and amending the second cause of action to a claim for damages resulting from incorrect reporting of gasoline sales. (R., pp. 279-271).

On April 4, 1977 a pre-trial order was entered by the Honorable Peter Leary holding, among other things, that plaintiff's third amended complaint could not be filed except as to the second cause of action and also holding that plaintiff's third cause of action relating to the failure to complete the lagoon system incorrectly stated the measure of damages as being loss of rental from the uncompleted restaurant. Rather, the court ruled that the correct measure of damages was the cost to complete the construction of the lagoon. (R., pp. 303-301).

Subsequently, on May 27, 1977 defendant moved for leave to file an amended counterclaim and answer. (R., pp. 387-381). Accordingly, the court allowed an amended answer to be filed but denied an amended counterclaim. (R., p. 389).

On June 14, 1977 a jury trial was commenced before the Honorable Peter F. Leary at the Tooele County Courthouse. At the time of trial five causes of action remained against the defendant. The first cause of action claimed that because defendant failed to keep the station open 24 hours as provided in the original lease agreement and in the prior judgment, plaintiff was financially damaged in that the rent was dependent upon the number of gallons sold per day.

The second cause of action claimed that defendant had wrongfully reported the correct number of gallons pumped each day and therefore plaintiff was damaged by the loss of the correct amount owing under the rental agreement.

The third cause of action was based upon the defendant's failure to complete the sewage lagoon as required in the lease agreement and stipulated judgment and for damages in accordance with the trial court's previous ruling based upon construction costs. The fourth cause of action claimed damages for failing to keep the station in good repair and the fifth cause of action claimed punitive damages for intentionally and knowingly violating the lease and the prior judgment of 1974.

Trial was commenced and plaintiff put on numerous witnesses and offered numerous exhibits in support of these allegations. Since this appeal primarily rests upon the sufficiency

of evidence, plaintiff-appellant will not restate the evidence offered during the trial at this time but will extensively review the evidence as to each cause of action dismissed by the trial court infra.

At the conclusion of plaintiff's evidence defendant moved for a directed verdict as to all five counts. The court granted a directed verdict as to the fifth cause of action, the fourth cause of action, the third cause of action, and the second cause of action. The court reserved its ruling as to the first cause of action until further arguments. (Tr., pp. A-45 to A-47).

On the following day the court directed a verdict as to the first cause of action stating that there was no clear evidence as to the amount of damage. (Tr., p. 533). The counterclaim of defendant was dismissed upon stipulation of the parties. (Tr., p. A-48).

Plaintiff appeals from this directed verdict.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO COUNTS 1 AND 3 OF PLAINTIFF'S COMPLAINT.

At the conclusion of plaintiff's case the trial court directed a verdict in favor of defendant and against plaintiff on the basis that no prima facie case had been made by the plaintiff with regard to the fifth, fourth, third, and second causes of action. (Tr., p. A-45). Subsequently, the court also directed a verdict as to the first cause of action. (Tr., p. 533).

Appellant will admit for purposes of this appeal that the trial court was probably correct in directing a verdict as to the second cause of action (the alleged incorrect reporting of gallonage), the fourth cause of action (damage allegedly caused by disrepair of the station), and the fifth cause of action (punitive damages). While there was some evidence as to each of these allegations it was probably not of a sufficient quantity or quality to merit jury submission.

However, the first cause of action (damages from closure of the station) and the third cause of action (damage from failing to complete the lagoon system) were legally sufficient for submission to the jury and the court committed error in directing a verdict as to these counts.

This Court in Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962) clearly delineated the standard to be applied in reviewing a directed verdict. This Court said:

> The issue of concern here is whether, reviewing the evidence and all inferences fairly to be drawn therefrom in the light most favorable to the plaintiff, a prima facie case. . .was made out. 375 P.2d at 459.

Likewise, in Flynn v. W. P. Harlin Construction Company, 29 Utah 2d 327, 509 P.2d 356 (1973) this Court stated that the trial court should not take a case from a jury where there is any substantial dispute in evidence on issues of fact and that the court can only do so when the matter is so plain that there is no conflict in evidence upon which reasonable minds could differ.

The Court in Flynn quoted with approval the statement of Justice Frick in an early decision which said:

> [I]f. . .the court is in doubt whether reasonable men,. . .might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court. 509 P.2d at 361 citing Newton v. Oregon Short Line Co., 134 P. 567 (1913).

A review of the evidence in light most favorable to the plaintiff will show without doubt that plaintiff produced sufficient evidence to preclude a directed verdict as to his first and third causes of action.

A. There was Ample Evidence to Allow the Jury to Conclude that a Breach of Contract Occurred by the Closure of the Service Station and Sufficient Reliable Evidence was Presented to Allow the Jury to Determine Resulting Damages.

This lawsuit emanated from a service station lease executed on November 24, 1971 between plaintiff, Carl Winsness and Associates, lessor, and defendant, M. J. Conoco Distributing, Inc., lessee. The pertinent provisions of this lease as it relates to the first cause of action are as follows: First, paragraph 2 provided a monthly "gallonage rental" of all gasoline at a rate of $.04 per gallon in the summer and $.02 per gallon in the winter. Second, paragraph 19 states that neither party shall control the other party's business operation but that "The obligations of the parties are expressly confined to the performance of the terms and conditions of this lease." Finally, paragraph 24 concerned hours of the station:

> It is agreed between the parties that the service station as provided herein shall be operated on a 24-hour basis and shall be open at all times to the public. (Ex. P-5)

In 1972 a lawsuit was commenced in Tooele County by plaintiff against defendant on basically the same grounds as the

present suit. One contention of plaintiff at that time was defendant's failure to keep the service station open for the 24-hour period agreed to in the leasing document. On February 26 and February 27 of 1973 a trial was held before the Honorable Gordon Hall concerning plaintiff's complaint. (Tr., p. 38). Before judgment, however, a stipulation was entered into between the parties and subsequently reduced to a stipulated judgment. (Ex. P-6 and P-7).

The judgment signed by Judge Hall provided that the lease of November 24, 1971 would remain in full force and effect "except as specifically modified by the Stipulations and Agreements as herein contained". Because of the gas shortage during that year and the difficulty in obtaining gasoline from any source the parties entered into a modification of the 24-hour provision of the original lease. The following modification is contained in the judgment:

> It is agreed between the parties that the service station provided herein shall be operated on a 24-hour basis at all times to the public except if the following conditions and events occur.
>
> 1. That the Federal or State or local governments by law require the closing of the service station certain hours or days due to a shortage of petroleum products or to conserve the same or
>
> 2. If gasoline from Continental Oil or the suppliers for M. J. Conoco, Inc. are on a quota or allocation basis by virtue of existing government regulations and the quota or allocation is below the 1972 sales of 452,045 gallons of gasoline for the Delle Service Station, and M. J. Conoco, Inc. providing the allocation or quota has been sold for the previous and monthly accounting period of the lease, can regulate the hours of the operating

> of the service station, providing it proportions the allocation or quota of gasoline for the next month over the number of days that the service station can be opened, but the service station must be open at least 8 hours each day. The station must be open each day until the allocation is sold and if not sold then the station must be open the next day a sufficient hours and succeeding days until the quota or allocation is sold. That in the allocation of gasoline or petroleum products M. J. Conoco will use its best effort to obtain petroleum products and gasoline at all times, and will treat all of its service stations under the allocation or quota equally, will apply surplus allocations or from the closing of other service stations proportionally to the Delle Service Station if existing Law and Government Regulations permit and will treat the Delle Service Station fairly in reference to all other service stations which it services or operates or distributes petroleum products to. (Ex. P-7, pp. 5-6). (Emphasis added).

Thus, the closure of the service station was not a new question which was raised by plaintiff in the instant case but had been an ongoing controversy since 1972 and a constant frustration.

Plaintiff offered ample evidence to show that the provision requiring the station to remain open for 24 hours a day was not being met. Plaintiff testified that during the month of May in 1974 he went to Delle, Utah approximately eight times and found the station closed three of these times mostly on Sundays. (Tr., p. 43). He stated that he contacted Dick Miller, president of the defendant, who assured him he would correct the situation. In June, however, he found the station closed again. (Tr., pp. 44-45).

In November of 1974 he met with defendant's officers and again complained that the station was not open. Stan Muir, a

partner in defendant, stated to him, "Fine, we'll take care of it. You don't have to worry about it." (Tr., p. 47).

During the Christmas holidays that year plaintiff found the station closed a number of times including a period of four consecutive days. (Tr., p. 48). In the early part of 1975 he also found the station closed repeatedly. (Tr., p. 50).

On January 7, 1975 plaintiff's attorney wrote to Richard Miller and stated, "We intend to hold you for all damages, for loss of sales in reference to gasoline and furthermore notify you that we immediately demand that the service station be kept open 24 hours a day". (Ex. P-55). This letter was followed by subsequent letters of April 11, 1975 (Ex. P-56) and April 14 (Ex. P-58).

In March of 1976 plaintiff called Lynn Kirkham who worked at M. J. Conoco and complained about the station being closed. (Tr., p. 52). On March 9, 1976 plaintiff's attorney again wrote to defendant and stated:

> This is to further notify you that my clients have informed this office that they have never agreed at any time to allow you not to keep the station open for 24 hours or waive the 24 hour provision and we have sent notice after notice to you in reference to this matter. (Ex. P-60).

Finally, a letter was sent August 4, 1976 again reiterating the terms of the lease and asking for compliance. (Ex., p. 61).

Plaintiff testified as to various pictures taken throughout the years and how the station was closed in each instance even when the sign on the door said OPEN. (See Exhibits P-9, P-10, P-18, P-19, P-20, P-26, P-28, and P-29; Tr., pp. 54-79).

Mildred Sims testified that she was the lessee of the adjoining restaurant and operated it from 1973 until 1976. (Tr., p. 174). She stated that initially the restaurant was kept open for 24 hours but because the station was not kept continuously open people on the highway could not see the facility from the road and she thus decided to close as she was doing no business. (Tr., p. 177).

In 1974 Mrs. Sims called Lynn Kirkham herself and reported that the station had been closed for as long as two or three consecutive days. He told her he would do something about it but didn't. (Tr., p. 179). She stated that she used to have a doctor's appointment every Thursday morning and that many a Thursday morning she would pull into the station and the station would be closed. (Tr., p. 183).

In the wintertime she testified that she would be awakened constantly by people wanting gas and that she even drained her own car to help them. (Tr., p. 185). Mrs. Sims testified that many people became angry because the service station was closed and that she had numerous confrontations during the three years with upset travelers. (Tr., pp. 210-211). Finally, she stated that while most of her business occurred during the weekends that this was the time when the station was usually closed. (Tr., p. 212).

Plaintiff called William Woffinden who had been a highway patrolman for 10-1/2 years assigned to the Wendover Road. (Tr. p. 214). He stated that the station was hardly ever open on nightshifts and that on weekends some of the help who were

hired would leave as soon as the boss drove out of the driveway. (Tr., p. 222).

The officer further stated that the service station was closed much of the time before midnight (Tr., p. 234) and that if the lights of the service station were not on the Delle Complex could not be seen by eastbound freeway traffic. (Tr., p. 243).

With regard to the gas shortage the officer testified that in 1974 the traffic was reduced but that at the time of trial it had picked up to its normal pace and in fact was heavier than ever. (R., p. 235). He also stated that a service station known as "Teddy Bear's Service" in Knolls was doing its best business that year and he could not see why Delle could not do the same if the hours were also the same. (Tr., p. 239).

Myron Baird, vice president of Teddy Bear's Service Station, testified that he frequently went by the service station during the time period in question and that while it was open every time during the day it was closed after 8:00 p.m.

Richard Miller, defendant's former president, was called to testify by plaintiff and stated he remembered being told twice by plaintiff that the station was not open. (Tr., p. 413). He could not remember receiving any of the letters sent by plaintiff's attorney. (Tr., pp. 416-418).

Jack Woods testified that he worked as a gasoline service station attendant in the facility between October, 1974 and March of 1975. (Tr., p. 435). He stated that the service station was closed about 50 per cent of the time when he arrived

for his shift. (Tr., p. 436). He further testified that on Saturdays the station would not be open until about 1:30 p.m. because of errands he had to run. (Tr., p. 438).

Thus, while it is true that plaintiff did not have a log showing the operation of the station during each hour of the disputed period it is clear that the evidence was sufficient to show that the service station was not being kept open on a 24-hour-a-day basis as provided in the stipulation and lease agreement. Although the estimates of the witnesses varied as to the amount of time the station was actually closed and as to the days and hours, the jury could have chosen to believe any, all, or none of the witnesses. Of course, the jury never had this opportunity.

As to the amount of damages sustained by the closure, plaintiff first attempted to introduce Exhibit 35 which was a breakdown of the number of gallons sold each month in 1972. Plaintiff testified that during this year the gas station was open on a 24-hour basis. (Tr., p. 96). As will be discussed infra the trial court committed serious error in failing to admit Exhibit 35 into evidence since such exhibit provided a past history of the service station's sales upon which a solid foundation could be based for an estimation of damages occurring from the early closures.

However, even without this exhibit there was sufficient evidence for a jury to conclude the amount of damages. Delbert Taylor was called by the plaintiffs as an expert witness in gasoline marketing. The witness owned his own service sta-

tions and had worked for several years as a district sales representative for Husky Oil. As such, it was his responsibility to investigate marketing potential of various service station locations and to predict how much money could be made under varying circumstances. (Tr., pp. 444-449). Mr. Taylor worked in this capacity for eight years. (Tr., p. 450).

He testified that it was his job to estimate income and gallonage of existing service stations to see if they were operating at full capacity. He stated that his estimates of gallonage were usually within 2 to 3 per cent of the amount actually pumped. (R., p. 450).

He further testified that he had been by the Delle Complex about 250 times. In 1971 and again in 1973 his company was interested in placing a station in the vicinity of Delle. Accordingly he made projections in both years based upon the Delle station.

The witness stated that in considering a projection for gas sales he considered several factors. The first was the location of the station including its nearness to a freeway, its access, its visibility, and the probability that traffic would stop there because of its distance from other service stations. (Tr., p. 452).

The next consideration was the traffic count obtained from the Utah Highway Department of Transportation. The witness studied the Delle traffic volume of 1971, 1973, 1974, 1975, and 1976. (Tr., pp. 452-453). The witness stated that in 1974 there were an average of 3,050 cars going by the sta-

tion daily. (Tr., p. 459). The Department of Transportation study also showed that there was a definite increase in traffic from 1974 to 1976 with 1974 being slightly less than normal because of the gas shortage. (Tr., p. 460).

Based upon these studies and his own experience Mr. Taylor stated that in his estimation there was sufficient traffic to keep the station open 24 hours a day. (Tr., p. 462). He stated that the location of the station was especially good because cars which had left Elko were beginning to run out of gas near the Delle station. (Tr., pp. 465-466).

Finally, the witness stated that based upon all of these factors and his own personal experience with the location, it was his opinion that the station would pump three times as much gas as the present gallonage reported if the station were to remain open 24 hours a day. (Tr., pp. 469-470).

He concluded that the sporadic hours testified to by other witnesses as proposed by plaintiff's counsel in a hypothetical question would result in a loss of all trucking business and 70 per cent of the potential car business. (Tr., pp. 469-470). Taylor estimated that based upon his projections the station should have been pumping about 90,000 gallons a month for July, August, and September. (Tr., pp. 499-500).

Defendant's attorney on cross-examination attempted to discredit Mr. Taylor's testimony by probing into a number of alleged inconsistencies. (Tr., pp. 471-497). During the Motion for Directed Verdict defendant's counsel argued vigorously to the court that Mr. Taylor's testimony was not believable and

that it was inconsistent and conflicting. Defendant's counsel therefore suggested that it be discounted. (Tr., pp. A-10 to A-14).

Plaintiff's counsel retorted that the testimony of Taylor was a matter which could be believed or disbelieved by the jury but that it was a question for the trier-of-fact to decide the credibility of his testimony. (Tr., p. A-31). Counsel argued that since defendant was obligated to pay to plaintiff the sum of $.04 per gallon sold during the summer and $.02 per gallon sold during the winter that the jury had suffibasis to compute damages relying upon the testimony of the witnesses concerning the time of closure and upon the testimony of Taylor relating to the number of gallons which could have been pumped had the station been open. (Tr., pp. A-39 to A-40).

The trial court in directing the verdict on this cause of action stated the following:

> Now, I know what your argument is, Mr. Duffin, but it appears to the Court that based on the testimony that has been presented that if I submitted the matter to the jury that I would probably be creating more error than I'm going to create now, if any; and that is, I'm going to grant the motion for directed verdict as to the first cause of action.
>
> I have stewed about this problem and stewed about this problem, and I just am unable to resolve it in my mind. If I can't resolve it, then I don't know how I can assist the jury in having them resolve it in their minds.
>
> * * *
>
> Now, the Court, I suppose, thinks its correct. But I suppose the Supreme Court will have to decide that.

* * *

> I'm not making my decision, Mr. Duffin, without giving it extremely considerable thought. I'm concerned about it, and it may well be during some of the matter I have made some erroneous decisions. You're left to whatever remedy you may want, including a motion for a new trial. (Tr., pp. 533-535).

The trial court demanded too much from the plaintiff in requiring exact evidence as to damages. Aside from having a 24-hour log of the station's activity during the three years and a competing service station next door to gauge the number of cars which needed gas, plaintiff did everything possible to present a reasonable basis for a trier-of-fact to determine damages. This Court in Security Development Company v. Fedco, 23 Utah 2d 306, 462 P.2d 706 (1969) held that damages are not to be denied simply because they cannot be ascertained with exactness. "If a reasonable basis of calculation is afforded, it is sufficient although the result is only approximate." (462 P.2d at 709).

Likewise, in Howarth v. Ostergaard, 30 Utah 2d 183, 515 P.2d 442 (1973), this Court stated that damages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered.

This rule is based upon the assumption that a party who has broken his contract will not be permitted to escape liability because of the uncertainty in the amount of damages and the fact that the full extent of damages for breach of contract must be a matter of speculation is not a ground for refusing

all damages. Gould v. Mountain States Telephone and Telegraph Company, 309 P.2d 802 (Utah 1957).

This Court in the Gould case cited with approval a Virginia case which stated the philosophy behind difficult damages. That decision said:

> Shall the injured parties. . .be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainly certainty, it is true, would be thus attained; but it would be the certainty of injustice. . .. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when from the nature of the case, the amount of the damages cannot be estimated with certainty . . .we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit. 309 P.2d at 806 (Emphasis supplied in original).

See also Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359 (1927).

Likewise, any inconsistency or failure of Mr. Taylor to give proper consideration to various factors goes to the weight of the evidence and not to its admissibility. As stated by this Court in the Redevelopment Agency of Salt Lake City v. Matusi Investment, Inc., 522 P.2d 1370 (Utah 1974) in speaking about expert witnesses this Court said:

> If he fails to give proper consideration or weight to any particular factor that goes to the credibility and not to the admissibility of his evidence. If it has deficiencies, they are subject to exposure on cross examination and the weight to be given it is for the jury. 522 P.2d at 1373.

For these reasons, the trial court erred in concluding that there was not sufficient evidence to allow the jury to make a conclusion as to the breach of contract and as to the damages. It is ironic that the trial court showed such concern for the uncertainty of damages after depriving the jury of Exhibit 35 which showed the amount of gallons sold in 1972 during a 24-hour-day operating period. The court created more difficulties in already difficult areas by omitting this exhibit as will be discussed infra.

B. There was Ample Evidence to Allow the Jury to Conclude that a Breach of Contract Occurred by the Failure of Defendant to Complete the Lagoon System and Sufficient Reliable Evidence was Presented to Allow the Jury to Determine Resulting Damages.

Plaintiff's third cause of action involved a claim based upon the defendant's failure to complete a functional sewage lagoon system. This system was to be used by the plaintiff in operation of a new restaurant to be built where the footings had already been poured. Once again, it is necessary to examine the language of the original lease agreement and the subsequent modification in the 1974 judgment.

The lease provided in Section 4-C the following clause:

> Sewage. Lessee shall supervise the construction of a septic tank and facilities on the premises of sufficient capacity to serve both of the respected facilities of the parties. All maintenance and repair expenses incurred after installation of the septic tank system shall be shared equally by the parties hereto. (Ex. P-5, p. 3).

Testimony at the time of trial showed that even as the lease agreement spoke in terms of a "septic tank" it was contemplated by the parties that a lagoon system would have to be installed.

(Tr., pp. 116, 122, 174). In fact, approval for the lagoon system had already been made by the State Department of Health one month before the service station lease was executed. (Tr., p. 252; Ex. P-5).

The stipulated judgment entered in 1974 went into great detail about the construction of the lagoon:

> That Carl Winsness and Associates shall furnish to defendant at no cost an easement and sufficient land to allow a lagoon system to be constructed upon the premises of Carl Winsness and Associates at Delle, Utah, said lagoon system is to serve defendant's existing service station and the new restaurant to be constructed in the future by Carl Winsness. Carl Winsness agrees to obtain and deliver, at his own expense, to defendant a legal description and mutually satisfactory easement or easements covering the real property underlying the lagoon system and its appurtenant facilities, said legal description and easements are to be provided by Winsness to defendant upon determination and mutual acceptance by the parties of a location for the lagoon system. It is expressly understood that the lagoon system is to serve the defendants service station and the new restaurant to be built by Carl Winsness only and that no other facilities or improvements will be connected to said lagoon system except other facilities mutually agreed upon at the new site, which will not overload the lagoon system.
>
> 3. The lagoon system provided for under the terms of this stipulation shall be designed and constructed at the sole expense and cost of defendant. Said lagoon system will be constructed in a square configuration which square shall be 20 feet wider than the width of the ponds presently engineered by Nielsen and Maxwell Engineers. The lagoon system shall be designed and constructed to comply with the minimum requirements of the State of Utah and the County of Tooele. All expenses and costs of maintenance and operation of the lagoon system after completion of construction shall be borne equally by the parties. Each of the parties shall bear their own costs of connecting their respected facilities to the pump station.

> That defendant will commence construction of the lagoon system at Delle, Utah within a reasonable time after execution of this stipulation and will complete the same within one year from March 8, 1974, except as may be excused due to acts of God, or other causes beyond the control of defendant. (Ex. P-7). (Emphasis added).

It was undisputed at trial that the lagoon had not been finally approved by the Department of Health. Defendant took the position that the stipulation and judgment only required completion of the lagoon facility and not approval by the Health Department to use it. (Tr., pp. 403-407).

Various officials from the governing health boards and sanitation districts testified as to the lagoon system. Numerous letters from the Division of Health to the defendant were introduced and received into evidence. Exhibit P-39 was the initial approval of the lagoon system dated October 22, 1971. Exhibit D-36 was a letter dated July 19, 1974 from plaintiff's attorney to the Department of Health requesting that he be notified whether the facility had been approved for operational use.

Defendant's Exhibit 38 is a letter dated August 14, 1974 from the Department of Health to defendant. The letter states that an inspection had been made of the premises on August 2, 1974 and that "The inspection has indicated that the treatment works, as constructed, deviates from the approved plans and that the existing facility does not comply with the Utah Code of Waste Disposal Regulations". Defendant was then told to cease the discharge of waste water in the facility until six specific items had been completed. A second letter of the same date was sent to Plaintiff by the Health Department outlining

the existing problems. (Ex. D-37).

On April 21, 1975 an additional letter was sent to defendant by the Division of Health allowing modification of the original plans and noting deficiencies which still existed before approval could be made. (Ex. P-46). On August 26, 1975 a letter was sent from the Division of Health to plaintiff's attorney stating the following:

> In response to your letter to us dated August 20, 1975 inquiring as to the current status of the above referenced project, Mr. Miller of M. J. Conoco Distributors, Inc. has informed us that the project has been in the finishing stages for some time now, with completion being delayed only by minor construction details to be cleared up by the contractor. (Emphasis added).

Finally, on May 5, 1976 a letter was sent to defendant by the Division of Health stating, "As you know, the waste water facilities as constructed have not yet been approved by this office due to construction deficiencies". The letter then listed five deficiencies or modifications which were still necessary for approval. (Ex. P-47).

In addition, several pictures were offered into evidence and received showing the condition of the lagoon pond in May of 1976. (Ex. P-14, P-15, and P-30). Plaintiff testified that he put in the foundation for the new restaurant in 1971. (Tr., p. 79; Ex. 31). He stated that the restaurant was not constructed because the lagoon system had not been completed by defendant and the restaurant could not have been made operational until such time. (Tr., pp. 81, 140, 142).

Plaintiff stated that he could not afford to invest $60,000 of $70,000 in a new restaurant and then not use it because of

the unfinished lagoon. (Tr., p. 113). He stated that to complete the lagoon would cost $10,000 or $15,000 and that he didn't feel it was his right to go in and complete the system when it was the defendant's obligation. (Tr., pp. 152-153). Plaintiff also stated that he was ready, willing, and able at the time of trial to put in the restaurant when the lagoon was completed. (Tr., pp. 81-82).

Art Maxwell, a civil engineer who originally designed the lagoon system, stated that after its initial design in 1971 he was not contacted by defendant until March of 1974 when he was asked to prepare an updated cost estimate of the construction. It should be noted that this contact occurred one month before the stipulation and judgment was entered.

An estimate showing three alternatives to finishing the lagoon system was prepared by Mr. Maxwell and submitted to the defendant. (Tr., pp. 259-261; Ex. P-45). Maxwell stated that he had examined the ponds recently and determined that they were not completed according to his plans and specifications.

Mr. Maxwell, based upon the testimony of the Department of Health officials and the files of the Department of Health, prepared an estimate as to what it would require to finish the construction of the lagoon and meet the requirements of the Division of Health. (Tr., pp. 348-356; Ex. P-51). He estimated the total cost to be $9,300.

This brief summary of plaintiff's evidence shows unquestionably that defendant had failed to complete the lagoon system "to comply with the minimum requirements of the State of Utah and the County of Tooele" as required in the Stipulation

and Judgment.

The trial court took the position that since plaintiff had not built the new restaurant, it had not been damaged by the failure to complete the lagoon. (Tr., pp. A-44 to A-45). Accordingly, the court directed a verdict as to this cause of action.

The trial court failed to recognize the fact that the lease, stipulated agreement, and judgment must be considered as a whole and not segregated into parts.

It is apparent that plaintiff gave up certain considerations and made certain concessions in exchange for those made by defendant. It is elementary that where each party has a legal benefit and legal detriment accruing to it and the contract is signed the contract is supported by legal consideration and that a promise for a promise is adequate legal consideration to support any contract. Tucson Federal Savings and Loan Association v. Aetna Investment Corporation, 245 P.2d 423 (Ariz. 1952).

Therefore, defendant was obligated to construct the lagoon just as plaintiff was obligated not to compete with defendant. (Ex. 5, p. 8). For the trial court to conclude that plaintiff suffered no damages because it did not construct the restaurant is totally erroneous when there is nothing in the lease agreement making the construction of the lagoon conditional upon the construction of the restaurant.

It is clear that plaintiff was deprived of a constructed lagoon which had been agreed to by the defendant. Had the

plaintiff in the negotiation of the original lease requested defendant to build a statue of Abraham Lincoln in consideration for promises and concessions to be made by plaintiff, defendant could not claim that it was not obligated to build such a statue just because it had no useful purpose to plaintiff. In effect, the trial court made this determination and completely ignored the underlying lease agreement and stipulated judgment.

There was competent testimony offered as to the cost of putting the lagoon in the condition which the defendant had originally agreed to do by the terms of the lease and judgment. (Ex. P-51). The defendant, of course, could question whether the estimated items were actually necessary for "completion" or could question the date that such estimation would be binding. But these would be matters for cross-examination and for defendant's own case to be submitted to the trier of fact for determination.

The trial court completely ignored the damage evidence by holding that the failure of plaintiff to build the restaurant precluded him from making any claim for damages. The court's reasoning in taking the matter from the jury was erroneous and requires reversal.

The trial court erred in directing a verdict as to the first and third causes of action by failing to allow the jury to consider the effect that the closure of the station had upon plaintiff's gallonage income and by failing to allow the jury to consider the damages caused by the uncompleted lagoon.

POINT II

THE TRIAL COURT ERRED IN EXCLUDING EXHIBIT 35 FROM ADMISSION INTO EVIDENCE WHEN IT WAS CLEARLY RELEVANT IN DETERMINING PLAINTIFF'S DAMAGES.

Exhibit 35 was an enlarged chart showing the monthly receipts of gasoline for the year, 1972. A facsimile of this exhibit is attached for the convenience of the Court as an Appendix to this brief.

Plaintiff was allowed to introduce into evidence the gallonage reported by defendant for the year 1976 (Exhibit 32), for the year 1975 (Exhibit 33), and for the year 1974 (Exhibit 34). Plaintiff testified that during 1972 the station was operating on a 24-hour-a-day basis and that the traffic conditions were not as good then as they were at the time of trial. (Tr., p. 96). Plaintiff then attempted to offer Exhibit 35 into evidence but the court sustained the objection made by defendant's counsel. (Tr., p. 97).

Subsequently, out of the presence of the jury, the following dialogue occurred between counsel and the court:

> MR. DUFFIN: Comes now the plaintiff, your Honor, and yesterday offered an exhibit as to the gallonage sold in. . .1972. It was not for the purpose of showing damages but to show prior gallonage. Mr. Winsness testified yesterday that the business that he had came from the west, but there was no difference in the marketing conditions in reference to the matter than there were at that time. He further testified they were open in 1972 approximately 24 hours per day. Now, the legal question is not for the purpose of damages--I mean not to show that there were any damages in 1972--but for the purpose of showing past due sales for the determination of future profits as discussed in 22 Am.Jur. Damages in Section 329. (Citations then gi-

> ven). . .It goes to the weight of the evidence. But as to the admissibility, that was the offer which I made.
>
> THE COURT: Well, the court's opinion is that the objection should still be sustained. It's the court's recollection that based upon the stipulation all matters prior to the entry of the judgment in 1974 were--I don't know whether compromised or what, but at least they were resolved. So, it would be the court's position that your basis, any time after 1974 are not prior thereto.
>
> MR. DUFFIN: I am not offering it--
>
> THE COURT: Well, you could not put in any evidence of prior earnings or profits.
>
> MR. DUFFIN: Well, the stipulation there wasn't any stipulation--the stipulation agreement was there would be no damages for any loss prior to that time. I'm not offering it for that purpose. I'm offering for the purpose of showing a regular established business which the Supreme Court said in the Eastman Kodak case
>
> THE COURT: Well, the objection will still be sustained. (R., pp. 133-134). (Emphasis added).

Plaintiff's counsel then proffered evidence which would have shown that in 1972 the gallonage sold was in excess of 502,000 gallons and that conditions were approximately the same during that time period. (Tr., p. 134). Defendant's counsel responded that conditions were different in 1972 and listed the factors causing the difference. Defense counsel then stated:

> But quite apart from that, we wish the record to show that the stipulation is specific and the trial covered all of these issues previously. And a stipulation is specific that it bound the parties and the amount of stated damages which were settled and which were paid and which has heretofore by the pleadings been admitted to have been received by virtue of these--the change in conditions from 1972 to 1974 is a part of the stipulation. (Tr., p. 135).

The stipulation stated the following:

> That Carl Winsness and Associates and M. J. Conoco Distributors, Inc. hereby mutually release and waive any rights, claims or causes of action that either party may have or claim against the other for any alleged breach of any of the terms of the written lease the parties dated the 24th of November, 1971 prior to the date of this stipulation. (Ex. P-6, pp. 3-4). (Emphasis added).

The trial court seriously erred when it considered that this stipulation precluded the use of the 1972 gasoline sales as a basis for establishing damages in 1974-77 period.

As plaintiff's counsel repeatedly told the court, Exhibit 35 was not meant to claim damages in 1972 but was meant to use as a comparison for what the station could pump if it were open on a 24-hour basis. Defendant's argument that conditions had changed since 1972 again went to the weight of the evidence which was a question for the trier-of-fact to consider.

It is fundamental law that evidence of prior profits in the same business, at least in the case of a business which has been established and is making a profit when the contract is breached, furnishes a basis, together with other facts and circumstances, for the computation of lost profits, and proof of such prior profits, or of the income and expenses of the business, for a reasonable time before the interruption charged is allowable. 22-A C.J.S., Damages, Section 162(4), p. 86. See also Mack E. Company v. Pizza of Gaithersburg, 270 A.2d 645 (Md. 1970) ("Loss of profits may be projected from past performance, assuming that past performance has continued long enough to be best evidence of damages which is available"); Western Rebuilders and Tractor Parts, Inc. v. Felmley, 391 P.2d 383 (Ore. 1964) ("Past profits may be shown, as basis for recovery

of future profits, if they reflect operation of established business"). See also Eastman Kodak Company of New York v. Southern Photo Materials, 273 U.S. 359 (1927).

This Court in Security Development Company v. Fedco, Inc. 23 Utah 2d 306, 462 P.2d 706 (1969) has held that expert testimony in relation to past history of sales is permissible in showing damages. In that case the question was whether or not the reduction in floor space of a lessee had damaged it by reducing its gross profits. Evidence was offered as to the gross sales during a period of several years. This Court stated:

> There was testimony of experts to the effect that net profits are directly related to gross profits which in turn are directly related to gross sales. The jury, therefore, had evidence of a proper basis from which it could have determined that plaintiff's business was adversely affected by the deprivation of floor space. 462 P.2d at 706.

Thus, the method of using previous business records to establish present damages is accepted as a legitimate method of proof. Had Exhibit 35 been introduced into evidence the plaintiff's expert witness, Mr. Taylor, could have given much more credible testimony based upon the prior history of the business. In addition, the jurors could have decided for themselves whether the changed conditions as argued by defendants was the cause of the tremendous decrease in gallonage from 1972 to the damage period.

The failure of the court to allow Exhibit 35 into evidence was especially harsh in this situation. Delle, Utah is an isolated, desolate location where no other service stations operate. Had the breach been in Salt Lake, for example, the business re-

cords of stations in the vicinity that had 24-hour service could have been used for damage purposes. Here, however, the only sure method of damage computation was based on the station's own history.

The trial court committed prejudicial error in excluding this exhibit from the evidence.

CONCLUSION

The evidence presented by plaintiff when viewed most favorably clearly establishes a sufficient basis for submitting the first and third causes of action to the jury. The evidence was overwhelming that defendant had failed to keep the service station open on a 24-hour basis in spite of the previous stipulated judgment in 1974. There was also sufficient expert testimony correlating the hours of operation with the number of gallons sold and this testimony together with the fixed rate of rental per gallon as provided by the lease agreement would have allowed the jury to determine a damage figure.

Had Exhibit 35 been admitted into evidence there could be no doubt that sufficient foundational proof would have been present for submission to the jury. The notion of the trial court that the previous stipulation precluded this evidence was clear error. The data was not offered for 1972 damages but only as a history for 1974-1977 damage comparisons.

Likewise, there was ample evidence that the lagoon had not been "completed" by any stretch of the imagination and that the stipulated judgment required it be built to the requirements

of the State authorities. There was also ample damage evidence presented as to the completion cost of the lagoon.

The trial court's ruling that plaintiff was precluded from claiming damages because the new restaurant had not been built was illogical and erroneous since it ignored the fact that the parties had made numerous concessions and demands as a whole and that defendant was therefore obligated to build the lagoon regardless of plaintiff's future plans for the restaurant. In addition, there was nothing in any of the agreements making the restaurant a condition precedent to the completion of the lagoon.

This was not a case where the defendant-lessee was being sued for breach of the leasing agreement. It was a case where defendant had already been sued in 1972 for the exact breaches and had agreed to rectify these breaches in a stipulated judgment. The ink was hardly dry on the judgment before defendant began the same course of conduct. For the trial court to penalize plaintiff for being unable to prove damages with mathematical certainty or for failing to build the restaurant under these conditions is both incredible and unjust.

For these reasons, the trial court erred in directing a verdict as to the first and third causes of action and this Court should remand the matter to the District Court for a new trial.

Respectfully submitted,

Thomas A. Duffin

THOMAS DUFFIN
Suite 510
Ten Broadway Building
Salt Lake City, Utah 84101

CRAIG STEPHENS COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Attorneys for Plaintiff-
Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two copies of appellant's brief to Allen H. Tibbals, attorney for respondent, 400 Chancellor Building, 220 South 200 East, Salt Lake City, Utah 84111, postage prepaid, this 1st day of May, 1978.

1972

GALLONAGE AT SERVICE STATION IN DELLE, UTAH

REPORT OF M. J. CONOCO

TO KARL W. WINSNESS & ASSN.

January	15,397	3,198
February	12,924	3,769
March	14,782	3,458
April	19,591	5,361
May	21,313	4,735
June	29,199	6,966
July	55,156	6,103
August	98,015	3,766
September	97,082	2,300
October	48,494	3,077
November	25,440	2,162
December	17,732	1,692
TOTAL	455,125	46,587

Total gas and Diesel 501,712

FACSIMILE OF EXHIBIT 35